UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Andrew C. SUBCLEFF 009 102

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2500

Andrew C. SUBCLEFF

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By order dated December 8, 1988, an Administrative Law Judge of the United States Coast Guard at Seattle suspended outright Appellant's Merchant Mariner's License for a period of six months upon finding proved the charge of negligence. The specification supporting the charge alleged that Appellant, while serving as Pilot under the authority of his above-captioned license, aboard the GLACIER BAY, O.N. 526588, did, on July 2, 1987, negligently ground said vessel at the approximate position of 60-29.4N; 151-26.4W, after failing to heed navigational information on NOAA Chart 16660, including Note E, and NOAA Chart 16662, including Note B, and supplemental information in U.S. Coast Pilot No. 9, Pacific and Arctic Coasts of Alaska pertaining to Cook Inlet, Alaska, resulting in the vessel's hull being holed and a major oil spill.

A similar charge for this incident has been brought against the vessel's Master and is reported as Appeal Decision 2501 (HAWKER).

The hearing was held at Anchorage, Alaska, on April 25-28 and May 1-2, 1988. Appellant was represented by professional counsel and introduced 17 exhibits into evidence, as well as his own testimony and that of eight witnesses. Appellant entered a response of DENIAL to the charge and specification as provided in 46 C.F.R. ÷5.527.

The Investigating Officer introduced 41 exhibits that were received into evidence and offered the testimony of seventeen witnesses. After receipt of the hearing transcript, the parties' briefs and the Investigating Officer's proposed findings of fact and conclusions of law, the Administrative Law Judge rendered a decision, on September 21, 1988, in which he concluded that the charge and specification were found proved. The final written Decision and Order suspending all licenses and documents issued to Appellant for a period of six months was entered on December 8, 1988. Appellant filed a Notice of Appeal on January 3, 1989, pursuant to 46 C.F.R. ÷5.703 and filed his brief with the Commandant on July 3, 1989, perfecting his appeal pursuant to 46 C.F.R. ÷5.703(c).

Appearance: James D. Gilmore, Esq., Gilmore & Feldman, 310 K Street, Suite 308, Anchorage, Alaska 99501.

FINDINGS OF FACT

1. Appellant Andrew C. Subcleff was at all times relevant serving aboard the GLACIER BAY in the capacity of Pilot under the authority of his duly issued License No. 009 102. This license authorized him to serve as Master of ocean, steam or motor vessels of any gross tonnage. It bears the Radar Observer unlimited endorsement, as well as the endorsement for First Class Pilot of any gross tonnage upon the waters of Southeast, Southwest and Western Alaska. On July 2, 1987, the license was current and valid.

2. The GLACIER BAY, Official No. 526 588, at all times relevant herein, was an oceangoing, deep draft oil tanker with a length of 774 feet, a beam of 125 feet and a gross tonnage of 37,784. At all times

relevant, the vessel was engaged in the coastwise trade.

3. On July 1, 1987, the GLACIER BAY departed Valdez, Alaska, destined for the Nikishka oil terminal in Cook Inlet with 380,600 barrels of crude oil. While en route, Appellant and the vessel's Master learned that the dock at Nikishka would be unavailable until nine hours later than the vessel's originally scheduled arrival time. Appellant and the Master made a joint decision to wait out the delay by anchoring inside the 10 fathom curve in the eastern portion of Cook Inlet about 11 miles south of Nikishka, 3.5 miles southwest of the Salmo Rock Buoy, and in a position not far from where the charted depth at mean low, low water would be 6 fathoms, five feet. With a draft of 32' 9", this would give the vessel, at the anticipated tidal stage, an underkeel clearance of 13.5 feet.

4. To this end, they proceeded into Cook Inlet. At approximately 2:47 a.m., July 2, 1987, the heavily laden vessel turned to an easterly course and headed for the previously selected anchorage site. At approximately 3:23 a.m., seven minutes before the maximum low tide, the vessel's anchor was dropped and, almost simultaneously, those on board experienced a "jolt". The vessel had struck an uncharted rock located, according to a post-casualty survey, at 60-29.6N; 151-26.16W, that rose approximately 30 feet above the surrounding flat bottom of sand and gravel, causing the vessel hull to be "holed". A substantial quantity of oil from the vessel's cargo leaked into Cook Inlet.

5. The chart in use on the GLACIER BAY at the time of the casualty was U.S. Department of Commerce, National Oceanic and Atmospheric Administration (hereafter "NOAA") Chart No. 16662, entitled Cook Inlet - Kalgin Island to North Foreland (1st Edition - April 9/83). This chart contains a precautionary note (Note B) which states: "Numerous uncharted and dangerous submerged boulders exist in the eastern portion of Cook Inlet. Mariners should use extreme caution in this area." Also on board was the smaller scale NOAA Chart No. 16660 (22nd Edition, May 22/82), whose Note E contained the same cautionary language.

6. References to Notes B and E are printed at several places on these respective charts, inside both the 10 fathom and 5 fathom curves, on the eastern side of Cook Inlet. In particular, Chart No. 16662 contains a large scale chart inset of the area from Cape Kasilof to the Kenai River. The "Note B" shown on that inset is approximately 2 nautical miles south of the grounding site and on approximately the same longitude within the 10 fathom curve. Both charts were the current edition as of the time of the grounding.

7. Each chart contained the following reference: "SUPPLEMENTAL INFORMATION - Consult U.S. Coast Pilot 9 for important supplemental information." The U.S. Coast Pilot No. 9 (12th Ed, January 1985) contains, among other things, the following message:

Dangers. - The shoals in Cook Inlet are generally strewn with boulders, which are on the otherwise flat bottom, give no indication to the lead unless it strikes them, and are not marked by kelp. Most of those located by the survey were found by sighting them at low water. It was noted in places that the boulders rise as much as 30 feet above the general level of the bottom. The boulders may be moved during the ice breakup in spring and by the action of strong currents. As a measure of safety, it is considered advisable for vessels to avoid areas having depths no more than 30 feet greater than the draft. At low water, deep-draft vessels should avoid areas with charted depths of less than 10 fathoms. [Emphasis added]

8. Appellant and the vessel's Master were both fully aware of the warnings contained in the charts and Coast Pilot at the time they made the joint decision to anchor within the 10 fat hom curve at low tide.

9. The Administrative Law Judge found that Appellant's failure to heed the navigational information in the charts and Coast Pilot and his decision to deviate from the customary route into Nikishka, navigating the GLACIER BAY through charted depths of less than 10 fathoms to an unsurveyed, experimental anchorage in the eastern portion of Cook Inlet, constituted negligence within the scope of 46 U.S.C. 7702.

BASES OF APPEAL

The bases of appeal from the Decision and Order are:

(1) That the Administrative Law Judge erroneously invoked the presumption of negligence;

(2) That the reliable, probative and substantial evidence of record does not support the Administrative Law Judge's determination of negligence;

(3) That the Administrative Law Judge erred in ruling Appellant's conduct constituted negligence rather than an excusable error in judgment;

(4) That the Administrative Law Judge erred in failing to regard certain language in Coast Guard Exhibit 27 as a binding admission against interest; and

(5) That the final order of the Administrative Law Judge is overly severe.

OPINION

I

Appellant argues that it was error for the Administrative Law Judge to rely upon the presumption of negligence that arises when a vessel strikes a fixed object. He maintains that, since the boulder was submerged and uncharted, the presumption does not arise, citing Delta Transload, Inc. v. M/V NAVIOS COMMANDER, 818 F.2d 445 (5th Cir. 1987).

The ALJ did take note that a presumption of negligence arises when a moving vessel collides with a fixed object1, that such a presumption may be invoked in these proceedings, and that Appellant had not rebutted the presumption. However, he also held that Appellant's negligence was proved wholly independent of the legal presumption:

In this case there is no need to rely upon the presumption of negligence. Respondent's negligence has been convincingly proved.

In view of the warnings it was not prudent to depart from the tried, tested and known route customarily used when approaching Nikishka and turn to an easterly heading into shallower water, the circumstances all being considered. To do so was not using "extreme caution", in view of the charts warning of the existence of uncharted and dangerous submerged boulders in the eastern portion of Cook Inlet.

* * *

It was not prudent to subject this vessel, loaded with crude oil, to the possibility of striking "submerged", "dangerous", "uncharted", "boulders" which were known to "rise as much as 30' above the general level of the bottom."

1 The more apposite cases are those holding that a presumption of negligence arises when a vessel grounds on a submerged object. Appeal Decision No. 2113 (HINDS) (presumption of negligence arises if vessel strikes a known submerged object even if the precise location is unknown.) See also, Appeal Decision 2278 (BELTON), Mid-

America Tr. Co., Inc. v. National M. Serv., Inc., 497 F.2d 776 (8th Cir. 1974); Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968); McWilliams Bros. v. Pennsylvania Railroad Co., 300 Fed. 687, 1924 A.M.C. 575 (S.D.N.Y. 1919). Vessels are presumed not to run aground in the ordinary course when operated by careful navigators. Appeal Decision 1200 (RICHARDS). And when a vessel grounds in a place where it has no business being under the commonly accepted dictates of piloting and good seamanship, the presumption of fault arises on the part of the

person piloting. Appeal Decision 2133 (SANDLIN), Appeal Decision 2382 (NILSEN), Appeal Decision 2409 (PLACZKIEWICZ).

* * *

It was not prudent to fly in the face of the chart and coast pilot warnings. Respondent's ship-handling, as such, is not an issue. That which has rightly been questioned in this case is his judgment. The Respondent spent a considerable amount of time and deliberation to arrive at what must be considered a colossal blunder. [D&O p. 30-31].

Thus, the Decision and Order did not rest or rely upon the presumption of negligence. Where there are two independent theories upon which a charge of negligence is found proved, the Administrative Law Judge's decision will be upheld even if one of those grounds could be forwarded on appeal as legally insufficient. Appeal Decision 2497 (GUIZZOTTI). To rule on the efficacy of the presumption in this case would amount to issuance of an advisory opinion. Here, the Administrative Law Judge ruled that Appellant's actions failed to meet the requisite standard of care and that the Government had "met its burden of proof by reliable, probative and substantial evidence, that is, by the preponderance of the evidence." [D&O p. 28]

II

Appellant alleges that, on the contrary, there was insufficient reliable, probative and substantial evidence to support a finding of negligence on the part of Appellant and points to numerous specific findings in the Decision and Order as unsupportable.

In considering this appeal, the factual findings of the Administrative Law Judge must be accepted unless unsupported by substantial evidence in the record as a whole or unless inherently incredible. Appeal Decision 2378 (CALICCHIO), Appeal Decision 2333 (AYALA), and Appeal Decision 2302 (FRAPPIER). As a corollary, if there is sufficient evidence to justify a finding, it is not required that the finding be consistent with all evidence in the record. Appeal Decision 2282 (LITTLEFIELD). Nor will conflicting evidence be reweighed on appeal if the findings of the Administrative Law Judge can be reasonably supported. Appeal Decision 2390 (PURSER), Aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986); Appeal Decision 2356 (FOSTER), Appeal Decision 2344 (KOHAJDA), Appeal Decision 2340 (JAFFE).

Appellant argues first that, contrary to the Decision and Order [p. 19], the grounding site is not a "virtual rock garden." He maintains that the witness who used the phrase "rock garden" was referring to the beach area and not to the grounding site, which was some 4.5 miles from shore.

A thorough review of the record reveals that a substantial amount of evidence was introduced concerning boulders in the eastern portion of Cook Inlet. Aside from warnings on the charts and in the Coast Pilot, local fishermen described the area on the beach and up to five miles out (which would include the grounding site) as being very treacherous and containing many huge, submerged rocks. [Tr. 183-184; 201]. From shore, at low tide, it is possible to see them scattered all over the immediate area of Karluk Reef [Tr. 190], which is not far from the grounding site. Local pilot Calvin Cary concurred that there are many large boulders on the beach, and that there is a general

sloping towards deeper water from the beach. [Tr. 897-898]. Admiral Wesley V. Hull, from NOAA, indicated that one can assume the boulders visible on shore continue out into the water since this is a glacial area. [Tr. 379-380]. Mr. Francis Buckler, the Coast Guard's expert witness on pilotage, testified further that the loose submerged boulders tend to move as a result of ice scarring and tidal current actions in the general area of Cook Inlet. [Tr. 567]. This is noted in the Coast Pilot as well.

Mr. Lewis Epps, Appellant's surveyor, testified from his experience in conducting surveys within the ten fathom curve and his background in mining engineering, that the whole of Cook Inlet could be characterized as sort of a scattering of boulders. Although in his view it is unusual to find large, non-movable boulders out to the ten fathom curve, it is not unknown. [Tr. 707, 723-725]. The Coast Pilot describes eastern Cook Inlet as being "generally strewn with boulders."

It is in this context that the Investigating Officer inquired whether "it's a lot like a rock garden to a certain extent, a lot of boulders" and this context which evidently generated the phrase "virtual rock garden" in the Decision and Order. The witness, Pilot Cary, responded "Uh-huh" to the inquiry, referring specifically to rocks on the beach. [Tr. 898]. However, I find that there is substantial, probative and reliable evidence to justify the extension of this metaphor by the Administrative Law Judge to the whole of eastern Cook Inlet within the ten fathom curve and discern no error in the finding in this regard.

Appellant next contests the finding that Appellant's anchorage site was a mile or more east of the route or corridor customarily used by pilots navigating to or from Nikishka. [D&O p. 21, 32]. Since Pilot Osnes testified that the grounding site was only .4 miles from Appellant's trackline to Nikishka, Appellant maintains that the finding was clearly erroneous.

In responding to this argument, it is first necessary to identify the grounding site. Through use of side-scan sonar, Appellant's surveyor, Mr. Lewis Epps, discovered the rock that was hit by the vessel to be at 60-29.6N and 151-26.16W. [Subcleff Ex. F]2. According to Exhibit F, this position is located approximately 1,300 feet to the east, and slightly south, of a 6 fathom five foot notation shown on Chart No. 16662 at approximately 60-29.6N and 151-26.5W.

The testimony from local pilots as to the customary transit route is remarkably consistent: Approaching Nikishka from the south, vessels position themselves approximately 6 nautical miles off Cape Kasilof3, heading north on a 022 course that will place them five miles off the mouth of the Kenai River. When reaching a point about four or five miles southwest of the docks, the heading is changed by several degrees (which is not relevant here since that course change is remote from the anchorage site) to head in toward the middle dock. [Tr. p. 257, 263 (Boyd), 827 (Wright), 872 (Joslyn), 892 (Cary)].

2 This position is within 50 to 60 yards of a rock on the same general longitude reported by NOAA in a similar post-casualty survey, and it is assumed that both surveyors found the same rock, with slightly different descriptions as to longitude.

3 All mileage described herein are nautical miles (6,076.1 feet) rather than statute miles (5,280 feet) except where expressly stated to the contrary.

Pilot James Wright described this trackline as a "corridor" and testified that it has been closely surveyed and traversed by many vessels over the years. The trackline is known to the pilots through practice, although everyone steers a slightly different course. [Tr. 855-860]. Pilot Anthony Joslyn affirmatively testified that the distance between his trackline and the 6 fathom five foot point

(described above) is 1 to 1.1 miles. [Tr. 885]. This testimony is consistent with the Judge's finding in the Decision and Order.

Appellant testified that, in 1985, he obtained a copy of NOAA Chart No. 16662, which is marked as Exhibit M, and he marked in ink a western trackline of 023 located 6.2 miles off Cape Kasilof and 4.7 miles off the Kenai River. He had used this trackline since 1985 because it was safer and in deeper water than the traditional trackline, located further to the east, that had been used prior to issuance of the 1983 edition of the chart. This obsolete trackline is also depicted on Exhibit M, showing a 022 course and lying 5.4 miles off Cape Kasilof and 4 miles off the Kenai River. [Tr. 988-93, 1022-1025, 1040-1042].

Using Exhibit M, and assuming the rock is about 1,300 feet east and slightly south of the 6 fathom five foot mark on the chart as described above, the distance from Appellant's customary 023 track line to the grounding site is approximately 1.6 nautical miles, and the distance from the obsolete 022 track line, used before 1985, to the grounding site is 1.1 nautical miles.

There was also testimony from an expert testifying for the Coast Guard, Francis Buckler, that the vessel initially went a full shiplength beyond the grounding site and then backed up into the rock. This would have placed the vessel at least 600 feet further east than the rock. [Tr. 1073-1074].

Appellant says Pilot Jim Osmes testified that the grounding site was .4 miles from his "courseline" [sic], citing the transcript at p. 807. Not only is Appellant's citation in error4, so is his representation of the substance of this testimony. In fact, Pilot Osmes estimated that it was .4 miles from his "courseline" to a red dot contained on Exhibit J. [Tr. 775-776]. Later in the transcript, it is revealed that the red dot did not depict the grounding site at all [Tr. 811-812] and that Osmes' testimony was based on a significant mistake of fact. Thus, Appellant's allegation of error concerning the distance that Appellant deviated from the customary route is without foundation. If anything, the Judge's finding that the grounding site was 1.1 miles from the corridor was conservative and favored Appellant to the greatest degree possible given the existing evidence.

4 Appellant supports his arguments on Appeal by reference to the hearing transcript at least 35 times. A comparison of the transcript with Appellant's Brief reveals that not a single citation in the Brief is accurate.

Next Appellant argues that the Administrative Law Judge er red in finding the chosen anchorage to be "experimental." The Decision and Order [p. 33] states: "It was virtually an experimental anchorage. He was pressing, navigating on the edge, that is, he was leaving no tolerance, relative to the vessels [sic] draft and charted depths, for the unusual or unexpected."

Appellant states that, on the contrary: he had anchored in the vicinity before; the second mate testified he found nothing unusual about the anchorage; that, per the testimony of Pilot Josslyn, the area had been regularly traveled; and that, per Pilot Cary, people traditionally anchored there. Further, Alaska Steamship Company's vessels had anchored there before.

In actuality, the experimental nature of the anchorage is an ultimate fact that was supported by overwhelming evidence.

Every pilot queried on the subject testified that he had never anchored a deep draft vessel in the area of the grounding. Each testified unequivocally that he always anchored outside the ten fathom curve anywhere from 1 to 5 miles south of the Nikishka dock. [Tr. p. 261, 269 (Boyd); 817-819 (Osmes); 887 (Joslyn); 897 (Cary); 932, 941 (Hawker)].

Appellant testified at the hearing that he had intended to seek out a "new anchorage" as an alternative to the one south of the dock, and that he was unaware of any other pilot who had chosen to use this new anchorage before. [Tr. 997, 1039]. Indeed, of Appellant's 360 trips into Nikishka, there were only three previous occasions on which he had ever anchored near the grounding site. [Tr. 1036]

Appellant argues that the grounding site could not be considered an experimental anchorage since Alaska Steamship Company had routinely anchored vessels there in the past. However, it is abundantly clear that Alaska Steam's use of the area has little bearing on whether it would be safe for deep draft vessels at low tide, especially in light of the warnings contained on the charts and in the Coast Pilot.

Various witnesses testified that Alaska Steam anchored in this area, southwest of the Salmo Rock buoy, some 27 to 40 years ago while loading cargo from a local cannery. [Tr. 288-89 (Boyd), 781, 798 (Osmes), 933 (Hawker)]. The average draft of the Alaska Steam vessels was described as 24 to 26 feet [Tr. 311 (Boyd)], 18 to 22 feet [Tr. 793 (Osmes)], and up to 28 feet [Tr. 933 (Hawker)]. There is no evidence on the record that Alaska Steam vessels navigated and anchored inside the 10 fathom curve at low tide with less than 30 feet under their keel. A pilot who is about to take deeper draft vessels into an area which was used in the past for vessels of lesser drafts is under a strong duty to check the depths of such channels before venturing forward. M/V GERWI v. United States, 467 F.2d 456, 1973 AMC 383 (3d Cir. 1972).

It is clear that this anchorage site was indeed experimental for a deep draft vessel at low tide with an expectation of an underkeel clearance of only 13.5 feet.

Appellant next argues that the Decision and Order [p. 33] contains a misinterpretation of the testimony of Pilot Francis Buckler. Mr. Buckler stated that Note B on Chart No. 16662, means: "In plain mariner language, get the hell out of there." [Tr. 571]. Appellant says the Administrative Law Judge made a mistake in thinking that the word "there" meant specifically the grounding site when, in fact, the chart note refers to the whole of the 10 fathom curve. However, the Administrative Law Judge made no mistake. Since the grounding site is contained within the 10 fathom curve, the admonition does apply to the grounding site. Appellant's argument is unsupportable in fact or logic.

The Administrative Law Judge surmised that Appellant "most likely as a matter of ease and convenience chose to use the Glacier Bay to test a new anchorage." [D&O p. 33]. Appellant argues that this is error in view of his own testimony that he carefully deliberated the options of how to deal with the nine hour delay in having access to the Nikishka dock. I agree the Administrative Law Judge goes too far in conjecturing that Appellant's decisions were made solely out of convenience. However, this is harmless error and does not change the result. Nor does it support Appellant's further argument, discussed below, that the accident was the result of an error in judgment.

Appellant next argues the evidence does not support a finding that Appellant failed "to heed navigational information" on the charts and in the Coast Pilot. He says that, in fact, the rock lay in 61' of water (over 10 fathoms) and, considering the vessel's 32'9" draft, there was almost 29' beneath the keel.

This argument is flawed logic. Regardless of the actual depth at the grounding site, Appellant navigated inside the 10 fathom curve at low tide for an extended period of time, transiting close aboard waters with a charted depth of only 6 fathoms five feet. Considering the stage of the tide (and the overtide) at the time, the actual depth at 6 fathoms five feet would be 46.5', [Tr. 268, 353] and the underkeel clearance would be only about 13.5' [Tr. 359].

To negligently disregard the admonitions on the charts and in the Coast Pilot and enter into waters known to offer an underkeel clearance of 13.5' was to flirt with disaster. The Administrative Law Judge was not clearly erroneous in finding that Appellant negligently grounded the vessel "after failing to heed navigational information..." [D&O p. 16].

The fact that, according to Appellant, there is a local custom among pilots to approach Nikishka with only a 10 foot underkeel clearance is irrelevant. Local custom is not evidence of reasonable care. Appeal Decision No. 2261 (SAVOIE). In any event, pilots testified that such custom is applied to a shoal located beneath a well-defined segment of the standard approach trackline and which must be crossed in order to reach Nikishka by the most efficient route. The pilots justify the custom of making this crossing with less than 30 feet of water under their keels because numerous surveys have been done of that particular segment of the shoal and they have safely achieved this crossing over time with practice. [Tr. 265, 828-832, 844, 857, 861]. If the pilots also support a 10 foot clearance rule outside the approach corridor in areas less than 10 fathoms that have not been exhaustively surveyed and which the charts and Coast Pilot warn against entering, then such custom would be negligent. It is well settled that custom and usage do not justify negligence. Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978), cert. denied 440 U.S. 959 (1979).

Finally, Appellant argues that it was error for the Administrative Law Judge to find there was a "tried and tested anchorage area" south of the Nikishka docks. [D&O p. 31]. Appellant maintains that the facts do not support such a finding because the various pilots testified that they anchored 1 to 5 miles south of the dock.

As noted above, each pilot testified unequivocally that he always anchored south of the dock and outside the ten fathom curve. [Tr. 261, 307 (Boyd); 817-819 (Osmes); 887 (Joslyn); 897 (Cary); 932, 941 (Hawker)]. This customary anchorage area, which is supported by substantial evidence to be "tried and true," is clearly ascertainable by reference to Chart No. 16662. It is obvious that anchoring in this area is an unwritten decision by consensus to specifically avoid anchoring inside the 10 fathom curve in an area that Appellant unfortunately selected.

It is my conclusion, therefore, that the Administrative Law Judge's factual findings are not clearly erroneous and are substantiated by reliable, probative and substantial evidence.

The single exception is the finding that the anchorage site was chosen for Appellant's ease and convenience, a finding which is conjectural but of no consequence to the outcome of this case.

III

Appellant next argues that his decision to anchor where he did amounted to an error of judgment rather than negligence and that he should therefore be exonerated.

Error in judgment is an affirmative defense to negligence. It recognizes that:

...there are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgement [sic] in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not the measure of compliance. Decision on Appeal No. 1755.

Appeal Decision 2173 (PIERCE), affirmed, NTSB Order EM-81. Accord

Appeal Decision 2325 (PAYNE); Appeal Decision 1940 (HUDDLESTON).

The error in judgment defense assumes that reasonable people would differ over a course of action, Appeal Decision 2216 (SORENSEN), and thus the question in each case is whether a competent licensed officer might reasonably have chosen the ill-fated alternative from among those choices available at the time. Appeal Decision 2034 (BUFFINGTON), affirmed, NTSB Order EM-57; Appeal Decision 2167 (JONES).

Here, the alternatives facing Appellant were to anchor at Homer, slow down the transit, sail up and down an established route, anchor south of Nikishka [D&O p. 31] or navigate inside the 10 fathom curve to this new anchorage site. In weighing these alternatives, the degree of care required under the circumstances is proportionate to the extent of loss should an accident occur. THE CLARITA, 90 U.S. 1, 15 (1874). In addition, where loss may result to the marine environment, extreme caution is required:

In any event, a higher standard of care must be imposed on the operators of vessels which have the potential for causing great environmental harm, if poor navigation judgments are made. It is true, as Appellant argues, that vessels are free to traverse any of the navigable waters of the U.S. But, if an operator takes his vessel into an area which he knows, or reasonably should have known, is hazardous, and by his action creates a threat to the safety of the vessel or to the quality of the marine environment, then his actions may be negligent, and he must bear the responsibility for them.

Appeal Decision 2057 (SHIPP).

Here, Appellant faced several alternatives that involved virtually no risk to the marine environment and no risk of grounding. The charts and Coast Pilot contained explicit, detailed warnings to avoid doing precisely what Appellant decided he would do. It is clear that a competent, licensed officer would not have elected the alternative to anchor the vessel where Appellant did considering the potential for enormous damage that could result from a spill. "It is not good seamanship...to assume that the chart is wrong. . . . The master is bound to stop his vessel if in doubt." Canada S.S. Lines, Ltd. v. Great Lakes Dredge & Dock Co., 81 F.2d 100, 1936 AMC 575 (7th Cir. 1935). Appellant failed to prove that his actions were an excusable error in judgment.5

IV

On July 9, 1987, seven days after the grounding, the Coast Guard Marine Safety Office, Anchorage, sent NOAA the following message, which was introduced at the hearing as Coast Guard Exhibit 27:

Reports indicate the vessel was preparing to anchor five (05) miles south of the Kenai River, position 60-29.4N 151-26.4W, [four and] one-half mile offshore when the incident occurred. Navigation information available at this time indicates this position to be safe for vessel traffic.

To ensure the safe transit of vessels in this area I request the NOAA vessel FAIRWEATHER while in vicinity, mid to late July, conduct a survey of the general area to locate and define any submerged object which may hazard navigation. Per Ref A, this area has a substantial volume of tanker traffic and legitimate concern exists over the safety of navigation in this area. [Emphasis added].

Highlighting the clause in Exhibit 27 that "navigation information available at this time indicates this position to be safe for vessel traffic," Appellant alleges that both he and the Coast Guard shared a reasonable belief the area was safe for navigating prior to the time the post-casualty surveys disclosed the presence of the unknown, submerged rock. Citing Federal Rule of Evidence 801(b), Appellant

argues that the highlighted phrase from Exhibit 27 constitutes a binding admission against interest by the Coast Guard and, as such, operates to exculpate Appellant from fault.

5 See Continental Grain Company v. Steamtug ARLINGTON, 1927 A.M.C. 900, 19 F.2d 285 (2d Cir. 1927) for facts that are remarkably similar to those in this case.

Exhibit 27 was clearly prepared by a duly authorized Coast Guard officer while acting within the scope of his authority and, to the extent it can be interpreted as an admission against interest, it is admissible under Federal Rule of Evidence 801(d)(2)(D) and is not considered to be hearsay.

However, the highlighted language alleged by Appellant to be the admission is not binding on the Coast Guard. Even though factual assertions in formal pleadings and pretrial orders in federal court are, absent amendment, considered judicial admissions and conclusively binding on the party who made them, American Title Ins. Co. v. Lacelaw Co., 861 F.2d 224 (9th Cir. 1988), assertions contained in documentary evidence are not binding and may be explained or rebutted by additional evidence, with the trier of fact free to determine what weight to be placed on the admission thereafter.

The case cited by Appellant in his Brief, U.S. v. DKG Appaloosas, Inc., 630 F. Supp. 1540 (E.D. Tex 1986) supports these propositions, as do Wilbur-Ellis Company v. M/V CAPTAYANNIS "S", 451 F.2d 973 (9th Cir. 1971), cert denied, 405 U.S. 923, 92 S.Ct. 962, 30 L.Ed. 2d 794 (1972); C.H. Elle Const. Co. v. Western Cas. & Sur. Co., 294 F.2d 459 (9th Cir. 1961); Schiller v. Penn Central

Transp. Co., 509 F.2d 263 (6th Cir. 1975); Guenther v. Armstrong Rubber Co., 406 F.2d 1315 (3d Cir. 1969); White v. Arco/Polymers, Inc., 720 F.2d 1391 (5th Cir. 1983); Employers Mut. Cas. Co. of Des Moines v. Mosqueda, 317 F.2d 609 (5th Cir. 1963); and U.S. v. 320.0 Acres of Land, More or Less in Monroe County, State of Fla., 605 F.2d 762 (5th Cir. 1979). The other case cited by Appellant, Childs v. Franco, 563 F. Supp. 290 (E.D. Pa. 1983), is inapposite in that it concerns statements made during trial by a party's lawyer.

Here, the purpose of the telex was to request NOAA's assistance in determining whether the area was safe for navigation or not. At best the meaning of the highlighted language in the first paragraph of this telex is ambiguous, and, in light of the voluminous evidence that the grounding site was not safe for navigation at low tide by deep draft vessels, as well as the warnings contained in government publications, the Administrative Law Judge was entitled to assign minimal weight to this telex.

It is too well established to require extensive citation that 'credibility choices and the resolution of conflicting testimony are within the province of the court sitting without a jury, subject only to the clearly erroneous rule of Fed. R. Civ. P 52(a)...' City of New Orleans v. American Commercial Lines, 662 F.2d 1121, 1123, 1982 A.M.C. 1296 (5th Cir. 1981). Accord, Appeal Decision 2302 (FRAPPIER), Appeal Decision 2347 (WILLIAMS). I decline to reweigh any possible conflict between Exhibit 27 and all other evidence in the record tending to show that Appellant should have known the area was in fact unsafe.

V

Finally, Appellant contends that the six month license suspension was overly severe and failed to give proper weight to the evidence he submitted in mitigation pursuant to 46 C.F.R. 5.569.

It has been held repeatedly that the order imposed at the close of the case setting the period of suspension is within the discretion of the Administrative Law Judge and will not be modified on appeal unless clearly excessive or an abuse of discretion. See Appeal Decision 2463 (DAVIS), affirmed sub nom. Yost v. Davis, NTSB

Order EM-155 (1989), and cases cited therein. The suspension imposed upon Appellant is within the suggested range of orders provided in 46 C.F.R. 5.569. Considering Appellant's conscious disregard of published warnings, as well as the risk posed to the marine environment by Appellant's negligence, I find nothing excessive in the length of the suspension.

CONCLUSION

Having reviewed the entire record and considered Appellant 's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The Decision and Order of the Administrative Law Judge dated 8 December 1988 at Seattle is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 26th day of July, 1990.

***** END OF DECISION NO. 2500 *****